IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

CMPMO No. 384 of 2004

Date of Decision: 15th May, 2007.

Municipal Council, Mandi. …**Petitioner.**

Versus

Kuldip Kumar and another. …**Respondents.**

Coram

The Hon'ble Mr. Justice V.K. Gupta, C.J.

Whether approved for reporting?[1] **Yes.**

For the Petitioner: **Mr. Shrawan Dogra, Advocate.**

For the respondents: **Mr. Neeraj Gupta, Advocate, for respondent No.1.**

V.K. Gupta, C.J. (Oral)

In File No.94/98 (date of institution 4.6.1998), an order was passed on 12th January, 2000 by the learned Collector, Sadar, Mandi Sub Division, District Mandi in an application filed under Sections 4 and 5 of the Himachal Pradesh Public Premises and Land (Eviction and Rent Recovery) Act, 1971 (1971 Act for short) evicting respondent No.1 from shop No.103 B.P. of the Sunkan Garden Complex, Mandi for the reasons and on the grounds mentioned in the aforesaid order. Aggrieved, respondent No.1 preferred an appeal under Section 9 of the 1971 Act before the learned Commissioner, Mandi

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[1] Whether the reporters of Local Papers may be allowed to see the judgment?

Division who vide the impugned judgment dated 28th May, 2004, relying upon Clause 11 of the agreement between the parties referred the parties to arbitration. Even though it is undisputed by the parties before me, including the petitioner that the aforesaid Clause 11 is and would constitute an arbitration agreement in terms of Section 7 of the Arbitration and Conciliation Act, 1996 (1996 Act for short) and would squarely bring within its ambit and purview the subject matter of the dispute referred to the Collector under Sections 4 and 5 of 1971 Act as well as the appeal before the Commissioner under Section 9 of the said Act, Mr. Dogra's contention is that the Commissioner erred in law in referring the parties to arbitration, totally ignoring the mandatory provision contained in Section 8 of 1996 Act. Section 8 reads thus:-

> "8. **Power to refer parties to arbitration where there is an arbitration agreement.-** (1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.
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> (2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

> (3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

A perusal of the record does show and Mr. Neeraj Gupta, learned counsel appearing for respondent No.1 does not dispute the factual position, that respondent No.1 had not, at any stage of the proceedings before the Collector taken recourse to sub-section (1) of Section 8 of 1996 Act in that, it had not at any stage of the proceedings, what to speak of the stage prior to the submission of the first statement, applied to the Collector with a request to refer the parties to arbitration. A clear and plain reading of sub-section (1) of Section 8 of 1996 Act does suggest that the parties have to be referred to arbitration by the judicial authority before which an action is brought in a matter which is the subject matter of arbitration only if one of the parties applies to such judicial authority not later than when submitting the first statement on the substance of the dispute with a specific request to refer the parties to arbitration. If such an application in writing is made by a party it becomes an obligation and duty of the judicial authority to decide this application and pass an order accordingly. If despite the existence

of an arbitration agreement and despite the fact that the subject matter of the dispute pending before the judicial authority is the same as is covered by the arbitration agreement, the party does not make such an application and after filing the first statement on the substance of the dispute continues to participate in the proceedings before the judicial authority, the remedy provided under the arbitration agreement for adjudication of the disputes before the Arbitrator gets totally lost and obliterated with the result that the judicial authority before whom the action was brought continues to possess and exercise jurisdiction in the matter despite the existence of the arbitration agreement.

Because of the aforesaid legal position, the learned Commissioner committed an error, in total ignorance of Section 8 of 1996 Act in referring the parties to arbitration. The impugned order dated 28th May, 2004 accordingly is set aside with directions to respondent No.2, Commissioner, Mandi Division, Mandi to rehear the appeal filed by respondent No.1 on its merits and in accordance with the provisions of 1996 Act and dispose it of very very expeditiously.

The petition is disposed of.

15th May, 2007. (V.K. Gupta), C.J.

(tr)